Appeals Court Ruling for Post

Following is the text of the U.S. Court of Appeals decision in connection with Washington Post publication of secret Pentagon documents.

On Petition for Rehearing and for Modification of Decision

Per Curiam: This is another phase of the Government's quest for injunctive relief against the publication by The Washington Post of material derived from a document entitled "History of U.S. Decision-Making Process on Vietnam Policy."

The case is now before us on the government's petition for rehearing and for modification of our decision of June 23, 1971, predicated for the most part on the order entered earlier the same day by the United States Court of Appeals for the Second Circuit in No. 1067, September Term 1970, United States v. New York Times remanding the case to the District Court for further in camera proceedings.

Having the greatest of respect for the solicitor general we have given his petition careful consideration but conclude that it should be denied. We state our reasons briefly.

1. The petition sets forth that neither the District Court nor this court has itself examined any of the documents, and continues: "On a matter involving the possibility of grave and immediate danger to the security of the United States, there should be an opportunity for an appropriate adversary hearing in court." We are of the view that there has been such an opportunity.

The complaint filed by the Government in the District Court prayed for a temporary restraining order enjoining the defendants from "dissemination, disclosure or divulgence" of the material in question "or any excerpt, portion or summary thereof." The District Court denied the motion for a temporary restraining order. A panel of this court, one judge dissenting, reversed the District Court's order and directed that court to hold a hearing, in order to afford the Government an opportunity to make its case on the facts. The panel specified that the issue at that hearing was whether the threatened publication would so prejudice the defense interests of the United States or result in such irreparable injury to the United States that publication should be restrained.

The hearing held by the District Court was conducted in part in open court, and in part in camera. In the open hearing a witness for the Government, Mr. Dennis J. Doolin, a senior official of the Defense Department, testified that he had been engaged in a continuing review of this History since November 1969, at the direction of the Secretary of Defense, to determine whether to grant the request of Senator Fulbright, Chairman of the Senate Foreign Relations Committee, for the study. This official further testified that the review "was continuing as late as the week before the articles appeared in The New York Times."

At the presentation to the District Court in camera the court had before it Top Secret affidavits and oral examination of government witnesses, including Mr. Doolin. In this session, as noted in our opinion yesterday, the Government was directed to focus on any specific document that would prejudice the nation's defense interests.

The government specified and discussed several documents. The District Court found that disclosure of those documents would not be harmful or that any harm resulting from disclosure would be insufficient to justify an injunction. Accordingly, the District Court refused to issue a preliminary injunction. We agreed with the conclusion of the District Court.

In this context we are satisfied that the government had appropriate opportunity to make the kind of showing appropriate to justify a prior restraint on the nation's historic free press. Its essential complaint is a dissatisfaction with our conclusion that it has not met its heavy burden of proof.

2. We turn to the difference between our order and that of the Second Circuit. We are not apprised directly of the state of the record before that court. We are advised by appellees that in opposing the application by The New York Times for a stay of that court's remand order, the Government recites that "it was unable to prepare as complete a submission as it could present with the additional time it had available in The Washington Post case."

We decided this case on the record made in the United States District Court for the District of Columbia and presented to us on appeal. Considerations of comity often call on one court to adjust its procedures in order to avoid interference with the processes of another court. But this cannot properly lead us to decide a case except on the record made, there having been adequate opportunity to make a record, and our best judgment as to the significance of that record. Considerations of comity may not properly be stretched unduly when what is involved is a prior restraint on the press we do not find constitutionally authorized.

3. The Supreme Court has been asked by The New York Times for a stay of the order of the Second Circuit. At the government's request we deferred the effective date of our order for two days in order that the Government might seek a stay of our order affirming the District Court. This procedure will provide appropriate opportunity for resolution of differences in approach between the two courts.

[illegible] ing brings out the possibility of inequities as between The New York Times and The Washington Post under the orders of the two courts as they stand. We observe that there may be newspapers not before either court which would have to be taken into account. Appellees' memorandum notes that since last night the Los Angeles Times has published another full story from the papers of the History, as have eight of the newspapers in the Knight chain, including the Philadelphia Inquirer, Detroit Free Press and Miami Herald.

The increasing disclosures increase our concern, expressed in our opinion yesterday, whether effective relief of the kind sought by the government can be provided by the judiciary.

We have given serious consideration of the government's request for oral presentation on the petition for reconsideration. We conclude that we are fully apprised of all material considerations and that the matter is now ripe for presentation to the Supreme Court.

The petition for rehearing and for modification of decision is denied.

Circuit Judges MacKinnon and Wilkey would grant the government's petition for the reasons stated in their dissents of 23 June 1971, and for the additional reason of the subsequent action of the Second Circuit in its related case.